Supreme Court, U. S.
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MICHAEL RODAK, JR., CLI

IN THE

# Supreme Court of the United States

October Term, 1979

NO. 78-1638

H. LYNN WOMACK,
*Appellant*

v.

CITY OF NORFOLK,
*Appellee*

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

## MOTION TO DISMISS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

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No.

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H. LYNN WOMACK,

Appellant

v.

CITY OF NORFOLK,

Appellee

---

On Appeal from the
Supreme Court of Virginia

---

MOTION TO DISMISS

---

The appellee moves the Court to dismiss the appeal herein on the following grounds:

1. The appeal is not within the jurisdiction of this Court, because not taken in conformity to Rule 11.

2. The appeal does not present a substantial federal question.

I. THE ORDINANCE INVOLVED AND THE NATURE OF THE CASE.

A. The Ordinance.

This appeal questions the validity of portions of Section 31-101 of the Code of the City of Norfolk, the complete text of which is as follows:

> Sec. 31-101. Sale, loan, exhibition, etc., of certain materials to juveniles.
>
> (1) Definitions. As used in this section:
>
> (a) Juvenile means a person less than eighteen years of age.
>
> (b) Sexually explicit nudity means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.



> (c) Sexual conduct means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.
>
> (d) Sexual excitement means the condition of human male or female genitals when in a state of sexual stimulation or arousal.
>
> (e) Sadomasochistic abuse means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.
>
> (f) Harmful to juveniles means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
>
> (i) Predominantly appeals to the prurient, shameful or morbid interest of juveniles;
>
> (ii) Is patently offensive to prevailing stand-

ards in the adult community as a whole with respect to what is suitable material for juveniles; and

(iii) Is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(g) Knowingly means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) The character and content of any material described herein which is reasonably susceptible of examination by the defendant; and

(ii) The age of the juvenile;

provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

(2) Unlawful acts.

(a) It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a juvenile:



(i) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles; or

(ii) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subparagraph (i) of this paragraph, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designated to prevent viewing from

any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in paragraph (a) or paragraph (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in paragraph (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in paragraph (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in paragraph (a) or paragraph (b) hereof, or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in paragraph (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in paragraph (b).

(e) It shall be unlawful for any person knowingly to exhibit, expose or display in public at newsstands or any



other business or commercial establishment frequented by juveniles or where juveniles are or may be invited as part of the general public:

(i) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles; or

(ii) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subparagraph (i) of this paragraph, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

(3) Punishment. Violation of any provision of this section shall constitute a misdemeanor, and any person convicted of such violation shall be confined in jail for not more than twelve months or fined not more than one thousand dollars, either or both.

(4) Exceptions to application of section. Nothing contained

in this section shall be construed to apply to:

(a) The purchase, distribution, exhibition or loan of any work of art, book, magazine, or other printed or manuscript material by any accredited museum, library, school or institution of higher learning.

(b) The exhibition or performance of any play, drama, tableau or motion picture by any theatre, museum, school or institution of higher learning, either supported by public appropriation or which is an accredited institution supported by private funds.

B. Statement of the Nature of the Case and Proceedings Below.

On April 10, 1978, H. Lynn Womack was tried and convicted by a jury in the Circuit Court of the City of Norfolk, Virginia, before the Honorable Alfred W. Whitehurst, Judge. Womack was tried on a misdemeanor indictment charging violation of §31-101 of the Norfolk City Code which alleged that on January 5, 1978, he did knowingly and unlawfully display



the magazine "Male Swinger," which depicted explicit sexual nudity, in a business where juveniles may be invited as part of the general public. The City elected to try the defendant before a jury with the concurrence of the Court, and over the defendant's objection.

At the jury trial, police investigator Stuart F. Auer testified that he entered Budget Books, a bookstore owned and operated by H. Lynn Womack at 2328 East Little Creek Road, on January 4, 1978; at which time he noted that the store was open to juveniles and that a section of the store was set aside for magazines showing sexually explicit nudity. He also testified that on that date several juveniles were in the store. On January 5, 1978, he returned to the bookstore and observed that the sexually explicit magazine "Male Swinger"

was on display and could be readily observed from portions of the store frequented by juveniles. Investigator Auer purchased the book from Ms. Retha Daniels after the book was viewed and perused by Womack.

Reverend Herbert H. Smith, Jr., who was qualified as an expert on contemporary community standards, testified that he was familiar with the magazine "Male Swinger" and that the magazine cover appealed to the prurient interest of juveniles. He stated that the magazine has no artistic, political or literary value, is patently offensive and is harmful to juveniles.

The defense presentation included the testimony of various persons who related that when they had been in the store, the sexually explicit materials were covered by a red translucent strip. After the close of Womack's case, the



City called as a rebuttal witness Ms. M. L. Cherry, who testified that she had visited the establishment on April 9, 1978, and that the sexually explicit magazines could be readily observed from portions of the store frequented by juveniles.

The case was submitted to the jury, which returned a verdict of guilty and set punishment at a fine of One Thousand Dollars ($1,000.00). This sentence was imposed by the Court on April 11, 1978.

On May 10, 1978, Womack filed a Notice of Appeal and Assignments of Error in the Norfolk Circuit Court, and on July 10, 1978, he filed a Petition for Appeal in the Supreme Court of Virginia. On November 14, 1978, that Court found "no reversible error in the judgment complained of" and refused the Petition. Womack did not file a Notice of Appeal

to the Supreme Court of the United States until April 18, 1979. During that entire period of time, he was represented by counsel.

During this time Womack has been under criminal charges by both the State of Virginia and the City of Norfolk and has been represented by James B. Power, Esquire, and Stanley M. Dietz, Esquire. (See letter of representation of Stanley Dietz, dated October 12, 1978, Appendix A, and letter of James B. Power, dated November 2, 1978, Appendix B.) There has been no motion by either attorney to withdraw as Womack's counsel, and accordingly no court has allowed them to withdraw.

## II. ARGUMENT.

### A. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT BECAUSE THE NOTICE OF APPEAL WAS NOT FILED WITHIN THE TIME PRESCRIBED BY RULE 11.

Jurisdiction to hear this appeal is



based upon 28 U.S.C. §1257(2), under the provisions of which this Court may review the decision of the Supreme Court of Virginia rendered on November 14, 1978.

28 U.S.C. §2101(d) provides that the time for appeal in such cases shall be as prescribed by rules of the Supreme Court.

Rule 11 of this Court provides that such an appeal:

> [S]hall be deemed in time when the notice of appeal prescribed in Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

As appellant admits in his Jurisdictional Statement, he did not file his notice of appeal within 90 days, nor did he file for an extension pursuant to Rule 34. It has been the practice of this Court to dismiss appeals which were

not timely filed, apparently upon the basis that timely filing of a notice of appeal is a prerequisite to its appellate jurisdiction. See: Stern and Gressman, Supreme Court Practice, 4th Ed., 1969, §7.3 at p. 334:

> The foregoing time limits for filing notices of appeal may not be extended under any circumstances or for any reason. Since the notice is a simple document to prepare, even simpler than a motion to extend the time would be, this is not an onerous prohibition. Failure to file the notice of appeal within the time prescribed by §2101 or Rule 11 may result in the dismissal of the appeal by the Supreme Court. Territo v. United States, 358 U.S. 279; Taggart v. New York, 392 U.S. 667. Id., §7.2 at p. 331.

In Matton Steamboat Co. v. Murphy, 319 U.S. 412, 87 L.Ed. 1483, 63 S.Ct. 1126 (1943), this Court considered untimely appeals from state court judgments sustaining the validity of a state



law:

> The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose ....
>
> We conclude that appellant's applications for allowance of the appeals, after the expiration of the three months period, were too late, and that this Court is without jurisdiction to entertain the appeals, which are accordingly dismissed. 315 U.S. at p. 415, 87 L.Ed. at p. 1485.

In response to appellant's offering his confinement and health problems as "reasons" for his untimely filing of the notice of appeal, it is sufficient to note that ordinarily the time for taking an appeal is not affected or postponed by the disability of the parties. See: 32 Am.Jur.2d, Federal Practice and Pro-

cedure, §272; McDonald v. Hovey, 110 U.S. 619, 28 L.Ed. 269, 4 S.Ct. 142 (1884); and Annotation, 87 L.Ed. 266.

Regardless of the reasons asserted for the delay, it appears that the time limits for appeals are jurisdictional, and that untimely application precludes review. Wright, Law of Federal Courts, §108, p. 429; Matton, supra; and Stern and Gressman, supra. Even if it be assumed, for purposes of discussion, that this Court would consider this appeal upon a proper showing of sufficient reasons for the failure to file on time or to obtain an extension, it is submitted that appellant has not made such a showing. As noted in Supreme Court Practice, supra, the notice of appeal is a simple document to prepare. Further, it was not necessary to obtain the record before preparing and filing the notice of



appeal. One hundred and fifty-five days elapsed between the judgment of the Supreme Court of Virginia and the mailing of the notice of appeal.

Appellant's Jurisdictional Statement does not say that he ever asked his former counsel to file a notice of appeal or a motion for an extension. It does not say what matters were difficult to prepare by reason of his confinement, or how his diseases (which it is believed existed prior to confinement) made it difficult for him to ask his lawyer to appeal. This Court should insist upon better "reasons" than those given, if it determines that such could serve as the basis for reviewing this case.

B. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE THE ORDINANCE IS CONSTITUTIONAL ON ITS FACE, ITS LANGUAGE BEING VIRTUALLY IDENTICAL TO THAT PREVIOUSLY UPHELD BY THIS COURT.

1. Regulation of Public Access by Juveniles to Sexually Explicit Materials Harmful to Them Is Constitutionally Permissible.

In Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274, reh. den. 391 U.S. 971, 20 L.Ed.2d 887, 88 S.Ct. 2029 (1968), this Court upheld the defendant's conviction for violating a State statute prohibiting a person from knowingly selling to a minor, under the age of 17 years, material "harmful to minors." The Court specifically considered the question of the constitutionality of the statute on its face and held that it did not invade the area of freedom of expression constitutionally secured to minors. In discussing this issue, the Court noted:

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather §484-h simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests ..." of such minors. Mishkin v. New York, 383 U.S. 502, 509, 16 L.Ed.2d 56, 62, 86 S.Ct. 958; Bookcase, Inc. v. Broderick, supra, at 75, 218 N.E.2d at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults ...." Prince v. Massachusetts, 321 U.S. 158, 170, 88 L.Ed.2d 645, 654, 64 S.Ct. 438. Ginsberg v. New York, supra, 20 L.Ed.2d at page 203.

Regarding the prohibition against exhibition of materials harmful to juveniles, which was impliedly but not specifically dealt with in Ginsberg, supra, this Court has indicated the constitutional propriety of such prohibitions on several occasions:

> Indeed, the members of the Court who would accord the

greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults. Young v. American Mini Theatres, 427 U.S. 50, 49 L.Ed.2d 310, 326, 96 S.Ct. 2440 (1976). (Emphasis added.)

[W]e have indicated ... that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690, 20 L.Ed.2d 225, 88 S.Ct. 1298 (1968). (Emphasis added.)

This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Miller v. California, 413 U.S. 15, 18-19, 37 L.Ed.2d 419, 427, 93 S.Ct. 2607 (1973). (Emphasis added.)

It thus appears that there is no



question but that the City may constitutionally prohibit the public exhibition to juveniles of sexually explicit materials harmful to them.

2. The Ordinance is Not Unconstitutionally Vague or Overbroad.

The major portion of §31-101, dealing with the sale or loan of materials to juveniles, was borrowed almost verbatim from §18.2-390 through 18.2-392.1 of the Code of Virginia, 1950, as amended. Those sections of the Virginia Code were in turn copied from the sections of the New York Penal Code upheld by the Supreme Court in Ginsberg v. New York, supra. The Court in that case specifically held that neither the provision of the New York statute defining obscenity "harmful to minors" nor its scienter provision were unconstitutionally vague. The only significant difference between the Virginia Code sections and those of the

New York Penal Code upheld in Ginsberg is that the Virginia Code has been amended to reflect the changes in the definition of obscenity mandated by Miller v. California, supra.

Since it is settled that the public exhibition of harmful materials to juveniles may constitutionally be prohibited, there remains only the question of the purported vagueness or overbreadth of that portion of the ordinance which prohibits exhibition. [Paragraph 2(e).] With respect to this prohibition against public display or exhibition of the types of materials specified by the ordinance, the very same definitions which identify such materials for purposes of forbidding sale or loan, identify those which may not be publicly displayed or exhibited in establishments frequented by juveniles. Since, as has been shown, the



definitions of such materials are not vague or overbroad for the purpose of forbidding sale or loan, they cannot then be vague or overbroad for the purpose of forbidding exhibition or display. Further, as noted in the previous discussion of Ginsberg, the provision defining materials "harmful to minors (juveniles)" and the scienter provision were upheld against vagueness attacks.

It is submitted that, regarding First Amendment overbreadth, having eliminated one of its possible sources, vagueness, the only other possible source in this case would be language in the ordinance which is precise but expressly seeks to regulate protected speech. See: Gooding v. Wilson, 405 U.S. 518, 520-22, 31 L.Ed.2d 408, 413-14, 92 S.Ct. 1103 (1972). This possible source of First Amendment overbreadth has been

eliminated by the showing, in the previous references to the Young, Interstate and Miller cases, supra, that regulation, even prohibition, of exhibition to juveniles of harmful sexually explicit materials does not violate the First Amendment. This type of "speech" is not protected when the audience contains juveniles.

CONCLUSION

For the reasons stated, this appeal should be dismissed because not timely filed, or in the alternative, that no substantial federal question has been presented.

Respectfully submitted,

PHILIP R. TRAPANI
BENJAMIN W. BULL
RONALD G. THOMASON
Room 908, City Hall
Norfolk, Virginia 23501

Counsel for Appellee



CERTIFICATE OF SERVICE

I hereby certify that on or before the 25th day of May, 1979, three (3) copies of the foregoing Motion to Dismiss have been deposited in a United States post office or mail box, first class postage prepaid, addressed to Roger E. Zuckerman, Esquire, Roger C. Spaeder, Esquire, and William W. Taylor, III, Esquire, Zuckerman, Spaeder & Taylor, 1800 M Street, N.W., Suite 375 North, Washington, D. C. 20036. I further certify that all parties required to be served have been served.

Ronald G Thomason

RONALD G. THOMASON

APPENDIX A

October 12, 1978

John Morrison
Assistant Commonwealth Attorney
Juveniel Division
Circuit Court Building
Norfolk, Virginia 23501

Dear Mr. Morrison:

This letter confirms our telephone agreement of October 11, 1978, wherein I informed you that I have been retained as Trial Counsel for Herman Lynn Womack regarding pending sodomy and other related charges.

I will be unable to appear in Norfolk for the preliminary hearing on November 13, 1978, and the Defendant will be en route to Lexington, Kentucky, where he is to serve four months incarceration.

By mutual agreement, the preliminary hearing will be continued to Monday, March 26, 1979. By copy of this letter, I am reminding my associate, James B. Power, to prepare the appropriate Motion in that regard.

Thank you for your kind cooperation.

Very truly yours,

/s/ Stanley M. Dietz

STANLEY M. DIETZ

SMD/shd
cc: James B. Power



APPENDIX B

November 2, 1978

Benjamin W. Bull
Assistant City Attorney
908 City Hall Building
Norfolk, Virginia 23501

RE: Commonwealth of Virginia vs.
H. Lynn Womack

Gentlemen:

It is my understanding that the above reference which is set for a preliminary hearing on November 13, 1978, will be continued by agreement of counsel. The basis for the continuance is that Mr. Womack has to report to the Federal Correctional Institute in Lexington, Kentucky on November 14, 1978.

It is further my understanding that the city and the commonwealth charges will be consolidated and all heard on March 26, 1979. On that date Mr. Womack will be available as his sentence from the United States District Court, Eastern District of Virginia, Norfolk Division is for a period of four months commencing on November 14, 1978.

Thank you for your cooperation, I am for all good wishes

Very truly yours,

/s/ James B. Power

James B. Power

cc:
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